Supreme Court, U.S.
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No. 90-1318

In The

Supreme Court of the United States

October Term, 1990

ROBERT E. HOOVER,

Petitioner,

v.

ARMCO INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by petitioner, would be presented for review in this case:

1. Whether the District Court was clearly erroneous in finding that petitioner brought in bad faith a retaliatory discharge claim under the Age Discrimination in Employment Act?

2. Whether the District Court committed an abuse of discretion in awarding partial attorney fees of $23,125.66 against petitioner, who had a net worth of $3,127,838, for his bad faith claim of retaliatory discharge under the Age Discrimination in Employment Act?

3. Whether the District Court was clearly erroneous in finding that petitioner brought in bad faith a time barred discriminatory demotion claim under the Age Discrimination in Employment Act?

4. Whether the District Court committed an abuse of discretion in awarding partial attorney fees of $1250 against petitioner, who had a net worth of $3,127,838, for his bad faith claim of discriminatory demotion under the Age Discrimination in Employment Act?

LIST OF PARTIES

Respondent Armco Inc. owns less than 100% of the following subsidiary companies:

Acerco S.A.

Acerex

Aceros Del Sur S.A. (Adesur)

Adesur Comercial S.A. (Adecom)

Armco Argentina S.A.

Armco Chile Procesamiento De Minerales S.A.

Armco Chile Productos De Ingenieria S.A.

Armco Chile Sociedad Anonima

Armco Colombiana, S.A.

Armco Comerical S.A.

Armco Da Amazonia Ltda.

Armco Do Brasil S.A.

Armco Delloye SA

Armco Finance (U.K.) Limited

Armco Indumetal SpA (Societa per Azioni)

Armco Industrial Sociedad Anonima

Armco Instapanel Sociedad Anonima

Armco International Insurance Company of Bermuda Ltd.

LIST OF PARTIES – Continued

Armco Limited

Armco-Marsteel Alloy Corporation

Armco Merchandising Limited

Armco Maringa S.A.

Armco Peruana, S.A.

Armcopaxi S.A.

Armco SpA

Armco Servicos E Comercio Ltda.

Armco Trust Limited

Armco Uruguaya S.A.

B N Underwriting Management Limited

British National Insurance Company Limited

British National Insurance Company of Bermuda Ltd.

Black River Lime Company

Control International SA

Control International, Inc.

Exos Bolivia Ltda.

Exim Overseas Limited

Minarmco S.A.

Metaltubos, C.A.

Metal Exportadora Chimbote S.A. (Metalex)

LIST OF PARTIES – Continued

National Supply Company of Mexico, S.A.

North Atlantic Management Company Limited

Northern Land Company

Obras Civiles E Industrias C.A.

Productos Metalicos Armco S.A.

Productora De Alambres Y Derivados S.A. (Prolansa)

Shalmet-US, Inc.

Tunaca – Tubos Nacionales, C.A.

Westchester Nominees Limited

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PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. The first of petitioner's "Questions Presented" describes this case as one "where [petitioner's] evidence was sufficient to establish a *prima facie* case of retaliatory discharge under the Age Discrimination in Employment Act . . . " In fact, the District Court never ruled that petitioner's evidence was sufficient to establish a *prima facie* case and, based on the court's findings of bad faith, it seems apparent the issue would have been ruled against petitioner. See Reasons for Denying Writ, *infra.*, pp. 5-6.

2. Petitioner alleges, without elaboration, that both the District Court and Court of Appeals "misstated the trial testimony in [certain crucial] important respects." (Cert. Pet., pp. 5 and 6) Such accusations ill serve petitioner and this Court. There is no basis for them.

REASONS FOR DENYING THE WRIT

I. Petitioner Claims No Important Issue Of Federal Law And There Is No Basis For *Certiorari* Under The Applicable Clearly Erroneous/Abuse Of Discretion Standard Of Review.

The District Court found two of petitioner's seven claims were brought in bad faith. Relying upon the bad faith exception to the American Rule on attorney fees, the court awarded partial fees of $24,375.66 against a plaintiff with a net worth of $3,127,838. The award was less than 25% of the fees incurred by defendants.

The discretionary authority of a District Court to award attorney fees incurred in defense of bad faith

claims is well established. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980); *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975); *Hall v. Cole,* 412 U.S. 1, 5 (1973). In the context of a fee award under a common benefit theory, the Court in *Cole* stated "[t]he element of 'bad faith' . . . is simply one of many considerations best addressed to the sound discretion of the District Court." *Cole,* 412 U.S. at 15.

Notwithstanding petitioner's creative statement of "Questions Presented", the actual questions on appeal are quite simple: (1) whether the District Court's findings of bad faith were clearly erroneous; and (2) whether the District Court abused its discretion in awarding partial fees. *Actors' Equity Ass'n v. American Dinner Theatre,* 802 F.2d 1038, 1042 (8th Cir. 1986); *Richardson v. Communication Workers,* 530 F.2d 126, 133 (8th Cir.), *cert. denied,* 429 U.S. 824 (1976).

In *Cooter & Gell v. Hartmarx Corp.,* ___ U.S. ___, 110 S.Ct. 2447, 2459 (1990), this Court recently applied the clearly erroneous/abuse of discretion standard of review to an award of attorney fees under Federal Rule of Civil Procedure 11, stating "[f]amiliar with the issues and litigants, the district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." The Court further stated, "[i]n practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions". *Id.* at 2458 (citing *Anderson v. Bessemer City,* 470 U.S. 564, 573-74 (1985)) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not

reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.") *See* Fed. Rule Civ. Proc. 52(a). This same deferential standard applies to review of an award of partial attorney fees under the bad faith exception to the American Rule. *Actors' Equity*, 802 F.2d at 1042.

In the present case, the Court of Appeals needed no such deferential standard to affirm the partial fee award. The court not only held there was no clearly erroneous finding or abuse of discretion, it expressed agreement "with the District Court that [petitioner] Hoover's 'retaliation claim was brought in bad faith [,] . . . was without foundation [,] and [was] the type of case 'which should never have been filed.' " (Cert. Pet., p. 4a)

Petitioner makes no representation, nor could he in good faith, that the Court of Appeals decided an important question of federal law or decided a federal question in conflict with decisions of this Court. Three of petitioner's six "Questions Presented" and two of the four "Reasons for Granting the Writ" relate exclusively to a $1,250 attorney fee award based on petitioner's pursuit of a time barred discriminatory demotion claim through five separate complaints. Petitioner ultimately abandoned the claim when confronted with a motion for summary judgment.

The petition for *certiorari* attempts to make this case into something that it is not, rather than presenting the case for what it is: an appeal raising the issues of whether

the District Court's bad faith findings were clearly erroneous and whether its partial fee award was an abuse of discretion.

II. *Certiorari* Is Not Warranted Based On Petitioner's Argument Regarding The Existence Of A *Prima Facie* Case And Purported Conflict With Other Court Of Appeal Decisions.

Petitioner argues circuit court conflict, and claims supporting circuit court authority, on his contention that his "claim was meritorious as a matter of law because petitioner made a *prima facie* showing of retaliatory intent . . . " (Cert. Pet., p. 6) In fact, there is no conflict, no supporting authority, and not even a finding by the District Court that plaintiff made a *prima facie* case.

Petitioner's argument on this issue cites no Supreme Court authority. He mischaracterizes his lead case, *Crawford v. Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980), as one where "the court held that a discrimination case cannot be called baseless or frivolous as a matter of law where the plaintiff establishes a *prima facie* case". (Cert. Pet., p. 6) The *Crawford* court made no such holding. It held that in the case before it, *where the plaintiffs prevailed on appeal and secured a very favorable remand,* the plaintiffs' claims were not a meritless or frivolous suit as a matter of law.

Crawford is a far cry from the present case, where the Court of Appeals affirmed partial fees against a petitioner who "pursued a baseless retaliatory discharge" brought in "bad faith" and "without foundation." (Cert. Pet., pp. 4a and 5a). The two other cases cited by petitioner, *Davis*

v. City of Charleston, 917 F.2d 1502 (1990) and *Glymph v. Spartanburg General Hospital*, 783 F.2d 476 (4th Cir. 1986), similarly rendered no holding that a *prima facie* case precludes an award of attorney fees. In *Neidhardt v. D.H. Holmes Co.*, 21 Fair Empl. Prac. Cases (BNA) 452 (E.D. La. 1979), *on remand*, 583 F. Supp. 1271, 1276-77 (E.D. La. 1984), the district court on remand awarded attorney fees after previously finding the plaintiff had established a *prima facie* case of employment discrimination. *See Swint v. Volusia County*, 1984 W.L. 1098 (M.D. Fla. 1984) (attorney fees awarded after District Court found no *prima facie* case, but ruled same result on merits if it assumed *prima facie* case). In each of these attorney fee cases, the court, like the District Court and Court of Appeals here, reviewed the evidence to determine the appropriateness of an attorney fee award.

Petitioner's argument is also premised upon a concept of employment law – the "*prima facie* case" – which has no bearing on a post trial attorney fee ruling because it "drops from the case" once the defendant responds to plaintiff's evidence. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.")

Petitioner's *prima facie* case argument is not only irrelevant; it ignores the fact that the District Court never ruled on whether petitioner established a *prima facie* case. The court merely denied respondent's motion for directed verdict at the close of petitioner's case and took

under advisement respondent's motion for directed verdict at the close of all the evidence. In *Glymph v. Spartanburg General Hospital*, 783 F.2d 476, 480 (4th Cir. 1986), a case cited by petitioner, the court stated that a denial of a motion to dismiss at the close of plaintiff's evidence was not a binding decision that the plaintiff established a *prima facie* case.

In the present case, the District Court's denial and taking under advisement the directed verdict motions reflects no ruling on the *prima facie* case; it merely reflects that the court proceeded with the caution urged in *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 379 n.9 (8th Cir. 1983):

> This case illustrates again that it is usually better practice for a district court, faced with a motion for directed verdict, to allow the case to go to the jury and address the issue by way of judgment n.o.v. if necessary. The jury may find for the moving party, in which case the issue disappears. If the verdict is against the moving party, and if judgment n.o.v. is granted, and if this Court decides on appeal that it should have been denied, the verdict can simply be reinstated, and no new trial is necessary.

The District Court in this case followed the mandate of the Eighth Circuit. In view of the bad faith holding on attorney fees, there can be little doubt how the court would have ruled on directed verdict and judgment n.o.v., if necessary. In *Matthews v. Peabody Coal Co.*, 1982 W.L. 416 (E.D. Mo. 1982), a district court similarly permitted the case to go to the jury and then awarded attorney fees against the plaintiff.

Petitioner's speculations regarding a *prima facie* case provide no basis for the grant of *certiorari*. More importantly, even if one assumes a *prima facie* case existed, no case holds that it precludes an award of attorney fees. When all the evidence is in, the existence of a *prima facie* case is irrelevant; a court looks at all the evidence to determine the existence of bad faith and the appropriateness of a fee award.

Here, after presiding over more than two years of pretrial activity and six days of trial, the District Court held that two of petitioner's seven claims were brought in bad faith and awarded partial attorney fees. That bad faith holding is "best addressed to the sound discretion of the District Court." *Hall v. Cole*, 412 U.S. 1, 15 (1973). Petitioner provides no basis for the granting of *certiorari* under the clearly erroneous/abuse of discretion standard of review.

III. The District Court's Holding Of Bad Faith And Supporting Factual Findings Fully Satisfied The Requirements For An Award Of Attorney Fees.

The District Court holding that petitioner brought two claims in bad faith is fully supported by three paragraphs of detailed factual findings regarding petitioner's conduct. (Cert. Pet., pp. 16a-17a) The District Court went on to expressly hold "[b]ased on these facts" that petitioner's claim was brought in bad faith, further summarizing its prior fact findings and reasoning as follows:

> Plaintiff deliberately walked off the job knowing that his earlier request for leave had been denied. He made no effort to contact Armco while he was away and he admitted he spent a good portion of the week at ski resorts and not

> with his ailing father-in-law. Based on these facts the court holds that plaintiff's retaliation claim was without foundation and is the type of case which "should never have been filed". (Cert. Pet., pp. 17a-18a)

The Court of Appeals not only found no error in the above conclusions, it expressed agreement with them. (Cert. Pet., p. 4a)

The District Court's detailed factual findings provide ample support for the award of fees. Petitioner's argument that a trial court must make "specific findings of an ulterior or improper motive" is not supported by the case law. In *Hutto v. Finney*, 437 U.S. 678, 689 (1978), this Court held a district court attorney fee award was adequately supported by a bad faith finding that did not include any finding of ulterior or improper motive – describing a bad faith award as one that makes a prevailing party whole for an opponent's "obstinacy". In the present case, the detailed factual findings of the District Court are far stronger than those in *Hutto*.

Petitioner's lead case is an Eighth Circuit opinion that was cited and relied upon by the Court of Appeals in affirming the attorney fee award against petitioner. *Actors' Equity Ass'n v. American Dinner Theatre*, 802 F.2d 1038 (8th Cir. 1986). The *Actors' Equity* court merely identified ulterior purpose as an example of what would evidence bad faith "in the present case." Petitioner also cites *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3rd Cir. 1986), which similarly cited improper motive as an example, not a prerequisite, of bad faith. It would make no sense to hold, as petitioner argues, that an express finding of ulterior motive is the only basis for a bad faith fee

award. Neither *Actors' Equity* nor *Ford* rendered such a holding. *Actors' Equity* recognized that "bad faith may exist where a party's claim is deemed to be totally without merit." 802 F.2d at 1042.

Petitioner's reliance on Tenth Circuit authority also fails to support the granting of *certiorari*. Petitioner cites *Autorama Corp. v. Stewart*, 802 F.2d 1284 (10th Cir. 1986), which applied the prior Tenth Circuit holding in *Sterling Energy, Ltd. v. Friendly National Bank*, 744 F.2d 1433 (10th Cir. 1984). *Sterling* remanded a bad faith attorney fee award because the "[trial] judge failed to tell us upon what factual basis he arrived at the conclusion of bad faith." *Sterling*, 744 F.2d at 1437. Here, the District Court made lengthy and detailed factual findings to support the conclusion of bad faith.[1]

Contrary to petitioner's argument, the District Court was not required to specifically state a finding of ulterior or improper motive. Numerous cases making bad faith attorney fee awards have done so without such a specific finding. *See Hutto v. Finney*, 437 U.S. 678, 689 (1978); *United Automobile, Aerospace & Agricultural Implement Workers v. United Farm Tools, Inc.*, 762 F.2d 76 (8th Cir. 1985); *Richardson v. Communication Workers*, 530 F.2d 126 (8th Cir. 1976), *cert. denied*, 429 U.S. 824 (1976); *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985); *Fisher v. CPC International, Inc.*, 591 F. Supp. 228 (W.D.

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[1] The final case cited by petitioner, *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), provides no guidance on any necessary findings of motive because the court found "it unnecessary to reach the question of the motives. . . . " *Id.* at 348.

Mo. 1984); *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421 (S.D.N.Y. 1984).

While no express finding of ulterior motive is necessary, in this case the record of detailed factual findings by the District Court effectively establish ulterior motive and provide a stronger basis for bad faith than a single express finding of ulterior motive. The Court of Appeals recognized this, after expressing agreement with the District Court's factual findings:

> It is manifest from the record that Hoover, in blatant disregard for Armco's vacation policy, went skiing in Colorado with friends while using his relative's ill health as a subterfuge for his absence.
>
> In our view, Hoover "intentionally advanced a frivolous contention for an ulterior purpose." *Actors' Equity Ass'n v. American Dinner Theatre*, 802 F.2d 1038, 1043 (8th Cir. 1986). After Armco fired him, Hoover brought and doggedly pursued a baseless retaliatory discharge claim out of spite. (Cert. Pet., pp. 4a-5a)

Contrary to petitioner's argument, the above Court of Appeal language reflects no independent fact finding; it merely states the obvious based on the detailed fact finding by the District Court. The District Court findings fully support the bad faith holding and the award of partial attorney fees. There is no basis for the granting of *certiorari* under the clearly erroneous/abuse of discretion standard of review.

IV. Petitioner's Arguments Disputing The $1,250 Fee Award Provide No Basis For *Certiorari*.

Points III and IV of petitioner's "Reasons for Granting the Writ" continue the dispute about a $1250.00 partial fee award based on petitioner's bad faith pursuit of a long time-barred discriminatory demotion claim through the original and four amended complaints. The District Court, as affirmed by the Court of Appeals, found bad faith in petitioner knowingly bringing and pursuing the demotion claim in the face of an undisputed statute of limitations defense. Aside from the hope that respondent would not raise the limitations defense, petitioner has offered no rational explanation for pursuit of the claim. Once the limitations defense was raised in response to the original complaint, there can be no rational explanation for further pursuit through four amended complaints. Petitioner now provides no argument justifying the granting of *certiorari*; he does not even attempt an argument that suggests *certiorari* is warranted because this $1,250 fee award against a plaintiff with a net worth over $3,000,000 somehow represents an important question of federal law or a decision on a federal question in conflict with the decisions of this Court.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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